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Coolrich Engineering (M) Sdn Bhd & Anor v Protection Rigging Access Services Sdn Bhd & Ors

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-73–02 OF 2017
FAIZAH JAMALUDIN JC
28 DECEMBER 2018

C

Civil Procedure — Res judicata — Matters which could and should reasonably have been raised in earlier proceedings — Whether claim for tort of conversion ought to be raised in sessions court's proceedings

D

Tort — Conspiracy — Conspiracy to injure plaintiff — Whether there was agreement between defendants — Whether there was intent to injure — Whether plaintiffs suffered loss or damage

E

Tort — Conversion — Claim in conversion — Whether defendants' conduct inconsistent with plaintiffs' rights — Whether defendants' conduct deliberate — Whether defendants' conduct was so extensive an encroachment on plaintiffs' rights as to exclude them from the use and possession of goods

F

The plaintiffs' case against the defendants was for the tort of conversion and for conspiracy to injure (ie the second category of tort of conspiracy) the plaintiffs for having caused the scaffolding materials used for the tank cleaning works during the Gumusut Project to be sent to two and third parties, namely Serba Mahir in Labuan and MNLG in Bintulu, Sarawak, without the plaintiffs' knowledge or consent. P2 had earlier made a claim against D1 at the sessions court for breach of contract under the terms and conditions of the service agreement. At the sessions court, P2 claimed that D1 failed to pay for 'standby charges' for manpower supplied for the Gumusut Project, charges for the delay in returning the scaffolding material and rental charges for the scaffolding material from 12 September 2014–11 March 2015 under the service agreement. The defendants' defence in essence was that the scaffolding materials were delivered to MNLG in Bintulu for storage in order to save costs and that the scaffolding materials were never used by D1 for the MNLG Project. The defendants also raised the defence of res judicata on the basis that the plaintiffs' claim had been adjudicated at the sessions court.

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Held:

(1) The evidence showed that the delivery of the scaffolding materials to the third parties was without the consent or knowledge of the plaintiff. The concealment by the defendants of the true location of the scaffolding materials from P2 and untrue testimony during the trial showed that D1's conduct was calculated and deliberate act to deprive the plaintiffs of their rights over the said scaffolding materials. Further, D1's conduct of delivering and/or causing the delivery of the scaffolding materials to the third parties after the expiry of the Gumusut Project was so extensive and encroachment on the plaintiffs' rights as it excluded the plaintiffs from the use and possession of the scaffolding materials. Accordingly, D1 had committed the tort of conversion in relation to the scaffolding materials which have been delivered to Serba Mahir in Labuan and MNLG in Bintulu (see paras 66–68 & 73).

(2) The emails between the D1 and Serba Mahir and net result of the scaffolding materials were transferred to Serba Mahir in Labuan and MNLG in Bintulu did point to this court to a concerted action between the defendants to encroach the rights of the plaintiffs to the materials. D2 had admitted that he and other defendants who were members of D1's management team had discussions and meetings to discuss and agree to send the scaffolding materials to Labuan and Bintulu without informing P2. Therefore, there was direct evidence before the court of meetings between D2, D3, D4 and D5 to transfer the scaffolding materials (see para 85).

(3) The defendants' conduct after P2 had filed the suit against D1 in March 2015, showed that the defendants did have the predominant intent of injuring P2 as a way of getting back at P2 for filing the suit against D1 at the sessions court. The conduct were D1 reneging on the agreement agreed between SP1 and D5 for D1 to replace the scaffolding materials purchased in Labuan with new materials purchased in West Malaysia; ignoring P2's queries on the status of the scaffolding materials and its demand for the return of the scaffoldings; and delivering the scaffolding materials to MNLG in Bintulu instead of returning them to P2 and hiding the fact from P2. The defendants also deliberately conspired to give untrue testimonies during the sessions court trial to conceal the delivery of the scaffolding materials to Bintulu from P2 and the sessions court (see para 86).

(4) Any damages suffered by P1 by reason of the defendants' conspiracy, was offset by the rental due and payable by P2 for the scaffolding materials under the rental agreements. Therefore, the court found that the defendants were liable for the tort of conspiracy to injure against P2 only (see para 88).

(5) P2's claim against D1 in the sessions court was for breach of contract made pursuant to the service agreement. The present suit was premised

on the tort of conversion and conspiracy to injure not only against D1 but also D2, D3, D4 and D5. P2 was only made aware that D1 had sent the scaffolding materials to Serba Mahir in Labuan during the trial at the sessions court. Additionally, P2 only found out that D1 had instructed Serba Mahir to deliver the scaffolding materials to MNLG in Bintulu after the conclusion of the trial at the sessions court. Therefore, P1 and P2 could not have brought an action premised on the tort of conversion against D1 and an action for conspiracy to injure against D2 to D5 prior to the trial at the sessions court. For the reasons stated above, the plaintiffs' present claim against the defendants was not res judicata between the parties. Accordingly, it would not a correct use of the court's discretion to dismiss the plaintiffs' claim on the basis that res judicata applied to the suit (see paras 93 & 95).

[Bahasa Malaysia summary

Kes plaintif terhadap defendan-defendan adalah untuk tort konversi dan untuk konspirasi untuk mencederakan (iaitu kategori kedua tort konspirasi) plaintif-plaintif yang menyebabkan barang-barang perancah yang digunakan untuk kerja-kerja pembersihan tangki semasa Projek Gumusut untuk dihantar kepada pihak-pihak kedua dan ketiga, bernama namely Serba Mahir di Labuan and MNLG di Bintulu, Sarawak, tanpa pengetahuan mahupun kebenaran plaintif. P2 telah pada awalnya membuat tuntutan terhadap D1 di mahkamah sesyen untuk pelanggaran kontrak di bawah terma-terma dan syarat-syarat perjanjian perkhidmatan. Di mahkamah sesyen, P2 membuat tuntutan bahawa D1 telah gagal untuk membayar 'caj sedia ada' untuk tenaga pekerja yang dibekalkan untuk Projek Gumusut, caj-caj untuk penangguhan dalam memulangkan barang perancah dan caj-caj rental untuk barang perancah daripada 12 September 2014 sehingga 11 Mac 2015 di bawah perjanjian perkhidmatan. Pembelaan defendan secara inti patinya adalah barang-barang perancah dihantar kepada MNLG di Bintulu untuk penyimpanan untuk menjimatkan kos-kos dan bahawa barang-barang perancah tidak pernah digunakan oleh storage D1 untuk Projek MNLG. Defendan-defendan juga membangkitkan pembelaan atas asas bahawa tuntutan plaintif telah diadili di mahkamah sesyen.

Diputuskan:

(1) Keterangan menunjukkan bahawa penghantaran barang-barang perancah kepada pihak-pihak ketiga adalah tanpa kebenaran atau pengetahuan plaintif. Defendan yang menyembunyikan lokasi sebenar barang-barang perancah daripada P2 dan testimoni yang tidak betul semasa perbicaraan menunjukkan bahawa tindakan D1 adalah terancang dan bertujuan untuk menidakkan hak plaintif-plaintif terhadap barang-barang perancah. Selanjutnya, tindakan D1 dalam menghantar dan/atau menyebabkan penghantaran barang-barang perancah kepada

pihak-pihak ketiga selepas Projek Gumusut tamat tempoh adalah sangat melebih-lebih dan menganggu hak-hak plaintif-plaintif kerana ia mengecualikan plaintif-plaintif daripada penggunaan dan pemilikan barang-barang perancah. Oleh itu, D1 telah melakukan tort konversi berkaitan dengan barang-barang perancah yang telah dihantar kepada Serba Mahir di Labuan dan MNLG di Bintulu (lihat perenggan 66–68 & 73).

(2) Kiriman-kiriman e-mel antara D1 dan Serba Mahir dan keputusan pemindahan barang-barang perancah ke Serba Mahir di Labuan dan MNLG di Bintulu telah menujukkan kepada mahkamah ini kepada tindakan bersatu antara defendan-defendan dalam memasuk capur hak-hak plaintif-plaintif terhadap material-material. D2 telah mengakui bahawa dia dan defendan-defendan lain yang mana adalah ahli pasukan pengurusan D1 telah melakukan beberapa perbincangan dan menghadiri mesyuarat-mesyuarat untuk membincangkan dan bersetuju untuk menghantar barang-barang perancah ke Labuan dan Bintulu tanpa memaklumkan kepada P2. Oleh yang sedemikian, terdapat keterangan langsung di mahkamah mengenai mesyuarat-mesyuarat antara D2, D3, D4 dan D5 untuk memindahkan barang-barang perancah (lihat perenggan 85).

(3) Tindakan defendan-defendan selepas P2 telah memfailkan sama terhadap had D1 pada Mac 2015, menunjukkan bahawa defendan-defendan memang ada niat utama untuk mencederakan P2 sebagai jalan membalas dendam kepada P2 untuk memfailkan saman terhadap D1 di mahkamah sesyen. Tindakan D1 dalam menafikan perjanjian yang dipersetujui antara SP1 dan D5 untuk D1 menggantikan barang-barang perancah yang dibeli di Labuan dengan barang-barang baru yang dibeli di Barat Malaysia; tidak mengendahkan pertanyaan-pertanyaan P2 atas status barang-barang perancah dan tuntutannya untuk pemulangan perancah-perancah; dan penghantaran barang-barang perancah ke MNLG di Bintulu yang sepatutnya dipulangkan kepada P2 dan menyorokkan fakta daripada P2. Defendan-defendan juga dengan sengaja bersekongkol untuk memberi testimoni-testimoni yang tidak benar semasa perbicaraan mahkamah sesyen untuk menyembunyikan barang-barang perancah ke Bintulu daripada P2 dan mahkamah sesyen (lihat perenggan 86).

(4) Sebarang ganti rugi yang dideritai P1 atas sebab konspirasi defendan, dibezakan dengan penyewaan yang terhutang dan perlu dibayar oleh P2 untuk barang-barang perancah di bawah perjanjian-perjanjian penyewaan. Oleh yang sedemikian, mahkamah memutuskan bahawa defendan-defendan adalah bertanggungjawab untuk tort konspirasi untuk mencederakan P2 sahaja (lihat perenggan 88).

(5) Tuntutan P2 terhadap D1 di mahkamah sesyen adalah untuk

pelanggaran kontrak yang dilakukan berdasarkan perjanjian perkhidmatan. Saman ini dirumuskan atas tort konversi dan konspirasi untuk mencederakan bukan sahaja terhadap D1 tetapi D2, D3, D4 dan D5. P2 hanya mempunyai pengetahuan mengenai D1 yang telah menghantar barang-barang perancah ke Serba Mahir di Labuan semasa perbicaraan di mahkamah sesyen. Tambahan pula, P2 hanya mengetahui bahawa D1 telah mengarahkan Serba Mahir untuk menghantar barang-barang perancah kepada MNLG di Bintulu selepas penggulungan perbicaraan di mahkamah sesyen. Oleh yang sedemikian, P1 dan P2 tidak boleh membawa tindakan ini atas rumusan tort konversi terhadap D1 dan tindakan untuk konspirasi untuk mencederakan terhadap D2 ke D5 kepada perbicaraan di mahkamah sesyen. Untuk sebab-sebab yang dinyatakan di atas, tuntutan terkini plaintif-plaintif terhadap defendan-defendan adalah bukan res judicata antara pihak-pihak. Oleh itu, ia bukanlah penggunaan yang betul untuk budi bicara mahkamah dalam menolak tuntutan plaintif atas dasar res judicata terpakai dalam saman ini (lihat perenggan 93 & 95).]

Notes

For a case on matters which could and should reasonably have been raised in earlier proceedings, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8454.

For cases in claim in conversion, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 149–153.

For cases on conspiracy to injure plaintiff, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 97–101.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 AMR 2559; [1995] 3 CLJ 783; [1995] 1 MLRA 611, FC (refd)

Fouldes v Willoughby (1841) 8 M&W 540, FC (refd)

Global Ventures Network Sdn Bhd v Lokman bin Dato' Mohd Kamal and another [2018] 6 MLJ 103, CA (refd)

Henderson v Henderson [1843] 3 Hare 100 (refd)

Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) [2002] 2 WLR 1353, HL (refd)

MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun and other appeals [1995] 2 MLJ 493, CA (refd)

Melawangi Sdn Bhd v Lim Kian Hian [2017] MLJU 845; [2017] 1 LNS 1473, CA (refd)

Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd [2017] 2 MLJ 592, CA (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)

Rimba Muda Timber Trading v Lim Kuoh Wee [2006] 4 MLJ 505, FC (refd)

Sanderson v Marsden and Jones (1922) 10 Ll L Rep 467, CA (refd)

Tekital Sdn Bhd v Sarina bt Kamaludin & Ors [2012] 8 MLJ 734, HC (refd)
Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others [2006] 4 SLR 451, HC (refd)
Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] 6 MLJ 810, CA (refd)
Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2014] 2 MLJ 799; [2014] 2 CLJ 445, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Schedule, item 11

Mohamed Izzul Faris (Syed Ibrahim & Co) for the plaintiffs.
Arham Rahimy Hairi (Edlin Ghazaly & Assoc) for the defendants.

Faizah Jamaludin JC:

INTRODUCTION

[1] The plaintiffs' claim against the defendants is for the tort of conversion and the tort of conspiracy to injure for having caused scaffolding materials, owned by the first defendant and rented by the second defendant, to be sent to two third parties at two separate locations, without the plaintiffs knowledge and consent. The scaffolding materials were sent by the defendants to Serba Mahir Sdn Bhd ('Serba Mahir') in Labuan and Malaysia LNG Tiga Sdn Bhd ('MLNG') in Bintulu, Sarawak.

[2] The first defendant, Protection Rigging Access Services Sdn Bhd ('D1') was appointed by Sabah Shell Petroleum Company Ltd ('Sabah Shell') as its contractor for a project known as 'Provision of Manpower and Equipment for Shell Gumusut Tank Cleaning Works' ('Gumusut project'). D1 in turn appointed the second plaintiff, Segi Perkasa Sdn Bhd ('P2') in September 2013 as its sub-contractor to provide all of the materials, equipment, tools and manpower for the tank cleaning works for the Gumusut project.

[3] P2 entered into a *service agreement between contractor and sub-contractor* for the Gumusut project dated 12 September 2013 ('service agreement') for a period of one year. Among the equipment provided by P2 under the service agreement were scaffolding materials for the tank cleaning works on Shell's Gumusut Kakap platform.

[4] It is the plaintiff's case that the scaffolding materials supplied by P2 to D1 under the service agreement were purchased by the first plaintiff, Coolrich Engineering (M) Sdn Bhd ('P1') and rented by P1 to P2 for purposes of the Gumusut project. P1 and P2 are related companies.

[5] The second to fifth defendants ('D2' to 'D5') are employees of the D1. D2 is D1's managing director, D3 is a director of D1, D4 is D1's finance manager at the material time and D5 is D1's contract manager.

[6] At the conclusion of trial, after considering the evidence before this court, the testimonies of the witnesses and the submission of counsels, I found that:

(a) the plaintiffs have proven on a balance of probabilities that the scaffolding material in question were purchased by P1 and that P1 is the owner of scaffolding material;

(b) P2 has the right to immediate possession the scaffolding at all material times based on the rental agreements between P1 and P2;

(c) the plaintiffs have proven on a balance of probabilities that the scaffolding materials were rented by P2 from P1 and that the materials were delivered by P2 to D1 for the Gumusut project;

(d) the plaintiffs have proven on a balance of probabilities that D1 had possession of the scaffolding materials from September 2014 to March 2017;

(e) D1 had committed the tort of conversion on the plaintiffs by sending the scaffoldings to Serba Mahir in Labuan and then to MNLG in Bintulu without the plaintiffs' knowledge and consent;

(f) the defendants have committed the tort of conspiracy to injure P2; and

(g) there is no res judicata or issue estoppel in the plaintiffs' action in this court against the defendants. P2's claim against D1 in the sessions court was made pursuant to the service agreement. The claim at the sessions court was for breach of contract. This present suit is premised on the tort of conversion and conspiracy to injure. P2 was only made aware that D1 had sent the scaffolding materials to Serba Mahir during the sessions court hearing and it had only found out after the sessions court hearing that D1 had instructed Serba Mahir to deliver the scaffolding to MNLG in Bintulu.

[7] At the conclusion of the trial, the defendants were ordered to pay jointly and severally to the plaintiffs:

(a) the sum of RM27,167 per month for the period beginning from 25 January 2015–20 March 2017; and

(b) interest at the rate of 5%pa on the total sum of the amount in (a) above from the date of judgment until the date of full settlement.

[8] I also ordered that the amount due from the D1 to the plaintiffs for the

balance of the scaffolding not yet returned by D1 to the plaintiffs to be assessed by the deputy registrar of this court. And for costs of RM80,000 to be paid by the defendants to the plaintiffs.

[9] The reasons for my decision and orders are as set out herein.

TRIAL

[10] The trial took place for three days before this court. The witnesses who testified at the trial were:

The plaintiffs' witness

WITNESS	NAME	POSITION
SP1	Wong Pow Lai	P2's Director
SP2	Liew Chan Chuen	P2's Project Engineer for the Gumusut project
SP3	Faizal bin Fakruddin	MNLG's Project Engineer in charge of the MNLG Project
SP4	Mejar Ramli bin Musa	MNLG's Head of Security
SP5	R Thiru	Dura's Sale and Operations Manager

The defendants' witnesses

WITNESS	NAME	POSITION
SD1	Datuk Wahiruddin bin Abd Wahid	D1's Managing Director
SD2	Mior bin Hassan	D1's Base manager at its warehouse in Labuan
SD3	Zaimah bt Zaini	D1's Director
SD4	Rajan a/l Singaram	D1's Contract Manager
SD5	Zairul Anuar bin Mustapha	D1's Finance Manager

THE PLAINTIFF'S CLAIM

[11] The plaintiffs' claim against the defendants are for the tort of conversion and for conspiracy to injure the plaintiffs for having caused the scaffolding materials used for the tank cleaning works during the Gumusut project to be sent to two third parties, namely Serba Mahir in Labuan and MNLG in Bintulu, Sarawak, without the plaintiffs' knowledge or consent.

[12] P2 had earlier made a claim against D1 at the sessions court for breach of contract under the terms and conditions of the service agreement. P2 claim

at the sessions court was that D1 failed to pay for 'standby charges' for manpower supplied for the Gumusut project, charges for the delay in returning the scaffolding material and rental charges for the scaffolding material from 12 September 2014–11 March 2015 under the service agreement. The sessions court held that D1 was not liable to pay for standby charges for manpower and for the usage of the scaffolding materials under the service agreement.

THE DEFENDANTS' DEFENCE

[13] The defendants' defence in essence is that the scaffolding materials were delivered to MNLG in Bintulu for storage in order to save costs and that the scaffolding materials were never used by D1 for the MNLG project.

[14] The defendants' also raise the defence of res judicata on the basis that the plaintiffs' claim has been adjudicated at the sessions court.

THE FACTS

(a) The scaffolding materials supplied by P2 to D1 for the Gumusut project

[15] SP1 testified that pursuant to the Gumusut project, P2 had delivered the scaffolding materials to D1 in two separate batches: the first batch in March 2014 and the second batch in May 2014.

[16] SP1 testified that the scaffolding materials were owned by P1 and rented by P2 from P1 for purposes of the Gumusut project. The quotation from P1 to P2 for the scaffoldings were via a letter dated 20 January 2014. SP1 testified that P1 purchased the scaffolding materials on two separate occasions from two separate suppliers.

[17] P2 confirmed the rental of the scaffoldings via two separate letters dated 1 March 2014 and 1 May 2014 respectively. The rental in March 2014 was for the first batch of scaffolding and the rental in May 2014 is for the second batch of rental due to the additional materials required by D1 for the Gumusut project.

[18] The defendants' counsel in his submission, challenged the authenticity of P1's quotation and the rental agreements between P1 and P2. Counsel submits that the maker of the quotation should have been called and that the plaintiffs did not adduce any evidence to prove that P1 had received the rental agreement dated 1 March 2014.

[19] David Wong JCA (as His Lordship then was) in delivering the Court of Appeal's decision in *Melawangi Sdn Bhd v Lim Kian Hian* [2017] MLJU 845;

[2017] 1 LNS 1473 held that:

> [24] It is clear that Bundle B contains documents where the authenticity of the same is not disputed but contents are. What that means is simply this. *There is no requirement to call any evidence to prove the authenticity or existence of the document in question. However, if any party wants to rely on the contents of that document, he or she must call for the evidence, oral or otherwise, to prove the truth of the same.* Unless that is done, the trial court cannot give any evidential value to the contents of that document. (Emphasis added.)

[20] The quotation and the rental agreements were placed in Part B of the common bundle of documents. It means that the authenticity of the documents are not disputed. Also, SP1 was the maker of the rental agreements and he had counter-signed the quotation to show P2's acceptance of the prices quoted. Accordingly, this court can give evidential value to the contents of the said documents.

(i) First batch: March 2014

[21] SP1 testified that on the first occasion, P1 purchased the scaffolding materials from Dura International Sdn Bhd ('Dura') in Kuala Lumpur ('Dura scaffolding materials') and ESTN Scaffolding Supply Sdn Bhd ('ESTN') in Labuan ('ESTN scaffolding materials').

[22] SP1's testimony in relation to the Dura scaffolding materials is corroborated by P1's purchase order dated 25 February 2014 for the Dura scaffolding materials from Dura; Dura's invoice dated 1 March 2014 and Dura's delivery order of the materials to P1's premises at Bukit Cherakah, Shah Alam, Selangor. The Dura scaffolding materials were delivered by P2 to D1's warehouse in Labuan. This is corroborated by P2's delivery orders dated 19 March 2014, which delivery were acknowledged by D1 on 21 March 2014. The Dura scaffolding materials can be seen under the heading *Scaffolding Access* in P2's delivery order shown in pp 9–10 of Bundle B6.

[23] SP1's testimony in relation to the ESTN scaffolding materials is corroborated by P1's purchase order dated 10 March 2014, ESTN's proforma invoice dated 11 March 2014 and ESTN's delivery note dated 19 March 2014. The ESTN scaffolding materials were delivered directly by ESTN to D1's warehouse in Labuan, which receipt was acknowledged by D1. The ESTN scaffolding materials can be seen under the heading *purchase from Labuan* on P2's delivery order dated 19 March 2014 in p 7 of Bundle B6.

(ii) Second batch: May 2014

[24] The second batch of scaffolding materials are scaffolding lifting bags purchased by P1 from Dura. P1's purchase order dated 26 May 2014; Dura's invoice dated 28 May 2014 and Dura's delivery order dated 28 May 2014 are shown in pp 17–20 of Bundle B7. The scaffolding bags were delivered by Dura to P1's premises at Bukit Cheraka.

[25] P1 purchased additional scaffolding materials from ESTN. The material purchased are detailed in P1's purchase order dated 26 May 2014; ESTN's invoice dated 26 May 2014 and ESTN's delivery orders dated 28 May 2014 and 29 May 2014. The additional ESTN scaffolding materials were delivered to D1's warehouse in Labuan by ESTN, which receipt was acknowledged by D1. The purchase order, invoice and delivery orders are shown in pp 17–20 of Bundle B7.

[26] The aforementioned documents show that the following scaffolding materials were purchased by P1 from Dura and ESTN and were delivered by or on behalf of P2 to D1 at their warehouse in Labuan for the Gumusut project:

NO	ITEM	QUANTITY
1.	Hot dipped galvanised scaffolding tube BS standard	
	(i) 48.3 mm x 4 mm x 6 mm	95 pcs
	(ii) 48.3 mm x 4 mm x 4 mm	75 pcs
	(iii) 48.3 mm x 4 mm x 3 mm	120 pcs
	(iv) 48.3 mm x 4 mm x 2 mm	160 pcs
2.	Drop Forged Double/Fix Coupler	500 pcs
3.	Drop Forged Putlog Coupler	200 pcs
4.	Drop Forged Swivet Coupler	200 pcs
5.	Sleeve coupler	150 pcs
6.	Base Plate 150 x 150 x 5 mm	80 pcs
7.	Single Pole Aluminium Ladder — 6m	5 pcs
8.	Single Pole Aluminium Ladder — 3m	3 pcs
9.	Wooden Board 45mm x 210mm x 1.5m	100 pcs
10.	Wooden Board 45mm x 210mm x 2.0m	150 pcs
11.	Wooden Board 45mm x 210mm x 3.0m	140 pcs
12.	Wooden ladder — 3.0m	6 pcs
13.	Wooden ladder — 3.6m	6 pcs
14.	Beam clamp	100 pcs
15.	Scaffolding bags	2 pcs

[27] SD2, Encik Mior Hassan bin Mat Piah, who at the material time worked as D1's base manager at its warehouse in Labuan, testified that he had

placed D1's chop on the delivery orders after receiving confirmation from SD4 that the scaffolding materials were from P2 for the Gumusut project. SD2 also testified that he together with SP2, Mr Liew Chan Chuen (who at that time was the Project Engineer for P2) and a person named Edmond, had arranged for the delivery of the scaffolding materials to Sabah Shell at the Asian Supply Base, which is 5km away from D1's warehouse in Labuan, for the use on Sabah Shell's Gumusut Kakap platform for the Gumusut project.

[28] Counsel for the defendant argues that based on SP5's testimony that there was no list made of the embossed markings on the scaffoldings materials and there were no photographs of the scaffoldings materials supplied to the Gumusut Kakap platform, therefore there is no evidence that the scaffoldings materials belonged to P1 and/or supplied by P1's suppliers. I find it difficult to accept the defendants' counsel argument against the documentary evidence contained in P1's purchase orders, Dura and ESTN's delivery orders and invoices, which are all contemporaneous documents. These documents recorded the scaffoldings materials purchased by P1 from Dura and ESTN and delivered to D1 at its warehouse in Labuan. There was no necessity for another list to be made of the scaffolding materials supplied to D1 since they have already been recorded in the delivery order signed by SD2 on behalf of D1. The scaffoldings materials are for use by P2 for the tank cleaning works on Sabah Shell's Gumusut Kakap platform pursuant to the Gumusut project. In my view, there is no reason as to why the plaintiffs should have photographed the scaffoldings materials when they were delivered to D1. In the same vein, the defendants' counsel should also query his client as to why it did not photograph the scaffolding materials when they were delivered to Sabah Shell for use in the tank cleaning works.

[29] For the reasons above, based on the documents and the testimony of the plaintiffs' and defendants' witnesses, I am satisfied that the plaintiffs have proven on a balance of probabilities that the scaffolding materials detailed in para 26 above were delivered by P2 to D1 in Labuan for the Gumusut project in the months of March and May 2014.

(b) Movement of the scaffolding materials after the completion of the Gumusut project

[30] The Gumusut project commenced in March 2014 and was completed in August 2014. Sabah Shell issued a certificate of completion dated 24 August 2014 confirming the completion of the tank cleaning services by D1 for the Gumusut Kakap platform.

[31] SP2 testified that during the Gumusut project, Sabah Shell had made three 'call-outs' for D1 to provide its services under the Gumusut project. SP1

testified that the tank cleaning works were carried out in tranches for the Gumusut project. Each time Sabah Shell makes a call-out for the tank cleaning works, SD1 will issue a separate call-out to P2 to undertake the tank cleaning works, where separate purchase orders and invoice will be issued for each call out.

[32] There were three call-outs in March, June and August 2014 respectively. SP1 and SP2 testified that after the third call-out by Sabah Shell in August 2014, P2 demobilised its equipment and manpower from the Gumusut Kakap platform and left the scaffolding materials on the platform. The scaffolding materials were not demobilised due to a possibility of a fourth call-out by Sabah Shell. SP1 testified that the scaffolding materials were left on the platform at the request of the Sabah Shell supervisor.

[33] On 4 December 2014, SP2's equipment, excluding the scaffolding materials, arrived at Bukit Cheraka. On 24 December 2014, SP2 emailed D5, who was D1's contract manager, informing him that the scaffolding materials were not returned to P2 and asked him when the scaffolding materials can be returned to P2.

[34] One month later, on 22 January 2015, P2 emailed D3, D4 and D5 asking for the status of the scaffolding materials. D3 replied the email stating that P2 will be informed once the scaffolding materials has reached Labuan. Again on 16 February 2015, P2 emailed D3 asking for an update of the status of the scaffolding.

[35] On 18 February 2015, Rajan ('D5') emailed P2 proposing to replace the scaffolding materials bought locally based on a listing to be mutually agreed by the parties. D5 stated that the reason for the proposal was because:

> 1. The scaffolding planks were bought locally, when returned to West Malaysia is considered 'export material' which needs fumigation and also surcharge and export taxes by virtue Labuan is duty free status.
>
> 2. The cost for transportation and custom documentation will be high.
>
> We therefore seek your good office to consider this proposition as the best way to resolve the scaffolding materials matter.

[36] P2 agreed with D5's proposal provided that the scaffolding wooden board and wooden ladder replaced in West Malaysia is new and of the same quality as the one supplied by P2 to D1. On 17 March 2015, P2 wrote to D5 asking him the status of the scaffolding materials. D5 replied on the same day stating that:

> we have placed order for the planks first which will be delivered by end of month. As for the tubes and couplers we are arranging to offset these items earliest possible.

[37] By that time in March 2015, P2 had filed its claim in the Kuala Lumpur Sessions Court (Suit No B52NCVC-8–03 of 2015) for standby charges for the manpower supply pursuant to the service agreement, charges for delay in returning P2's equipment and rental charges for the scaffolding from 12 September 2014–11 March 2015.

[38] P2 continued to request the status of the scaffolding materials from D1 in the months of April and May 2015. However, the requests were ignored by the defendants. P2 issued a final demand to D1 on 29 May 2015 to return the scaffolding materials for its unauthorised possession of the materials. This notice of demand was similarly ignored by the defendants.

D2–D5's testimony at the sessions court trial

[39] The trial at the sessions court took place for three days between 1 September 2015 and 12 January 2016. D2–D5 in their witness statements stated that the scaffolding materials were placed with Serba Mahir in Labuan.

[40] SP2 says until D2 to D5's testimony at the sessions court, P2 did not know how and when the scaffolding materials were sent to Serba Mahir. D1 did not inform P2 despite repeated email requests by P2 for the status of the scaffolding materials.

Delivery of the scaffolding materials by Serba Mahir to Bintulu

[41] SP2 says that based on D2 to D5's testimonies in the sessions court, he went to Serba Mahir on 29 March 2016 and was informed by Serba Mahir's director, Mr Albert Anthony that the scaffolding materials were not with them. As the scaffolding materials were missing, SP2 then filed a police report in Labuan on the same day.

[42] In a letter dated 15 April 2016 to the Polis Diraja Malaysia, Serba Mahir stated that on 25 January 2015, Serba Mahir received three units of 'open top tray', which was rented by D1, to end the rental of the 'open top trays'. However, Serba Mahir was not able to stop the rental of the trays because there were scaffolding materials belonging to P2 in the trays. D1 then instructed Serba Mahir to deliver the scaffolding materials to Bintulu, Sarawak. Serba Mahir wrote that on 21 August 2015, it delivered all the scaffolding materials to Bintulu, which materials were received by D1's representative in Bintulu, Sarawak. The delivery order attached to Serba Mahir's letter shows D1's acknowledgment chop and signature by D1's representative. Serba Mahir also enclosed the email correspondence between Serba Mahir and D1 in respect of the delivery of scaffolding materials to Bintulu. Copies of the delivery order and emails are in pp 4–10 of Bundle B5.

A **[43]** The evidence shows that despite D1 making the arrangement in May 2015 for Serba Mahir to deliver the scaffolding materials to Bintulu and the fact that Serba Mahir had delivered the scaffolding materials to Bintulu in August 2015, D2 to D5 testified in the sessions court during the trial in October 2015 and January 2016 that the scaffolding materials were with Serba
B Mahir. During the trial of this present case before me at the High Court, both D2 and D3 testified that they knew that the scaffolding materials were delivered to Bintulu in August 2015, which is contrary to their testimony to the judge at the sessions court.

C

[44] D2, who is D1's managing director confirmed that D1 planned to deliver the scaffolding materials to Bintulu in May 2015 and when asked by the plaintiffs' counsel during cross-examination, agreed that P2 was not informed of the decision. D5 also testified that he knew in May 2015 of the decision to
D deliver the scaffolding materials to Bintulu. D2, D3, D4 and D5 during the trial at this court confirmed that their testimony in the sessions court stating that the scaffolding was at Serba Mahir was untrue. D4 further testified that prior to the sessions court trial, all four of them had a meeting in their office to discuss the scaffolding materials and confirmed that all of them knew that in
E October 2015, the scaffolding materials were in Bintulu.

Award of MNLG project to D1 in April 2015

[45] It was revealed during the trial in this court that D1 was awarded a
F contract for maintenance painting works by MNLG at the MNLG terminal in Bintulu ('MNLG project') in April 2015. The plaintiff's subpoena witness, Encik Faizal bin Fakruddin ('SP3') who was the project engineer in charge of the MNLG project testified that the MNLG project was awarded to D1 on 22 April 2015. SP3's testimony was corroborated by D2 and D5.

G

[46] Wong ('SP1') met with Liew ('SP2') in Bintulu between March and April 2016, where Liew informed him that the scaffolding materials were being used by D1 for the MNLG project. At that time Liew had left P2 and was in the employ of D1 as a project coordinator/planner for the MNLG project on a
H contract basis for a period of six months. SP1 then lodged another police report based on the information he received from Liew. Based on the police report, SP1 together with Inspector Poh Han Siong, who was the investigating officer from the Polis Diraja Malaysia visited the work site at MNLG where the MNLG project was carried out. They were taken around the site by Mejar
I Ramli ('SP4'), who is MLNG's Head of Security. At the work site, SP1 identified scaffolding materials which bear markings consistent with the scaffolding that were being used at the work site of the MNLG project. Photographs were taken by MNLG's representatives of the materials identified by SP1 during his visit. Mejar Ramli emailed those photographs to Inspector

Poh who then forwarded them to SP1. Mejar Ramli was one of the plaintiff's subpoena witness. During the trial, he confirmed SP1's site visit together with Insp Poh and the emails attaching the photographs taken during the visit, which he sent to Inspector Poh.

[47] Encik Faizal ('SP3') testified that the scaffolding materials brought in by D1 would be placed at a temporary lay down area provided by MNLG. He confirmed that the scaffolding used for the MNLG project was placed at the temporary lay down area. SP3 testified that the photographs that were taken and emailed to Inspector Poh were mostly taken at the temporary lay down area at the terminal area know as 'Sea Cooling Water Intake Station' where the painting works pursuant to the MNLG project were carried out. Faizal's testimony was corroborated by Mejar Ramli. He confirmed during cross-examination that the photographs of the scaffoldings were taken at the temporary lay down area.

[48] The plaintiff's subpoena witness from its supplier Dura was Mr R Thiru ('SP5'), who is their sales and operations manager. Thiru testified that scaffolding materials supplied by Dura are identified based on the markings on the material. He confirmed that the photographs of the scaffolding tubes taken in the temporary lay down area at the MNLG work site shown in p 15 of Bundle B5, were supplied by Dura.

[49] From Thiru's testimony, it can be concluded that the photographs at pp 15–16 of Bundle B5 show that the scaffolding tubes at the temporary lay down area in MNLG were the same Dura scaffolding tubes supplied by P2 for the Gumusut project.

The defendants defence that the scaffoldings were stored at MNLG

[50] D2, D3, D4 and D5 in Q & A 13 of their respective witness statements identically stated that the scaffolding materials were kept at their storage place at MNLG in order to save costs as they have additional space there to keep the said materials, which was also the place where the materials used for the MNLG project are kept. They state that D1 obtained scaffolding materials from third parties specifically for the MNLG project.

[51] However, both Faizal and Mejar Ramli testified that scaffolding materials brought in by D1 were not to be stored at MNLG but for use. They also said that D1 did not inform them of any scaffolding materials that were not to be used or which were off limits. Faizal testified that it is not MLNG's policy to allow goods belonging to third parties to be stored at the project site or at the laydown area. Faizal said that the laydown area is just a transit area and Mejar Ramli said that the laydown area is for goods 'waiting to be deployed'. It

A is not an area for contractors to store their materials. Mejar Ramli said that there is no temporary storage area at MNLG's site. He says that MNLG does not have enough space to store goods and that its rents outside warehouses to store its own goods.

B **[52]** Datuk Wahiruddin and Puan Zaimah testified that D1 obtained MNLG's approval to store the plaintiff's scaffolding materials at MLNG. However, the defendants did not provide any documentary evidence to prove the same.

C **[53]** I find that the Faizal and Mejar Ramli are witnesses of truth. They are independent witnesses, with no interest in the outcome of this suit. From their testimonies, I conclude that it is not true that MNLG would have given D1 any approval to store the plaintiffs' scaffolding materials at MNLG.

D **[54]** Furthermore, Faizal testified that the MNLG project was delayed because of insufficient scaffolding materials. D5, who is D1's contract manager confirmed during cross-examination that the plaintiff's scaffolding was the first to arrive at MNLG in August 2015. He said scaffoldings supplied by third party suppliers only arrived in December 2015. I find it implausible that D1 would not use the plaintiff's scaffolding materials whilst waiting for the scaffoldings supplied by third parties to carry out the MNLG project and also to supplement the scaffoldings supplied by third parties due to insufficiency of scaffolding materials.

F **[55]** Mior Hassan ('SD2') testified that usually scaffoldings would need to supplied within two months after a project is awarded. This timeline was confirmed by Rajan ('D5') during his testimony.

G **[56]** Rajan testified he was in charge for the issuance of purchase orders for D1. He said that for purchase orders to D1's suppliers for the MNLG project, the purchase order will contain the word 'MNLG' at the purchase order number ('PO No'). The purchase order in p 59 of Bundle B7 is the purchase order issued by D1 to Serba Mahir instructing them to deliver the scaffolding H materials to Bintulu. Its PO No has the word 'MNLG', which based on Rajan's testimony means that the scaffolding materials are meant for the MNLG project.

I **[57]** Based on the available evidence and the testimonies of the witnesses, I find that the plaintiffs have proven on a balance of probabilities that D1 had used the plaintiff's scaffolding materials for the MNLG project. On the other hand, I find that the defendants had failed to discharge its evidential burden of proving that it had delivered the plaintiffs' scaffolding materials to MNLG for storage only.

THE LAW ON CONVERSION

[58] What is conversion? The editors of *Clerk and Lindsell on Torts* define conversion as:

> an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use of the possession of it. As will appear, the defendant need not intend to question or deny the claimant's rights; it is enough that his conduct is inconsistent with those rights. (*Clerk and Lindsell on Torts* (20th Ed), Thomson Reuters, 2010 at para 17–07.

[59] Simon Douglas in his article '*The Nature of Conversion*', *Cambridge Law Journal*, March 2009, pp 198–223 defines conversion as 'the exclusion of the claimant from use or possession of his goods'. As the editors of *Clerk and Lindsell on Tort* remarked, it is not possible to categorise exhaustively all modes of conversion. They say that this is because:

> while some acts are necessarily an absolute abrogation of the claimant's rights and deprive him of the whole value of his interests in the goods, there may be others where the courts retain a degree of discretion in deciding whether those acts amount to a deprivation.

[60] Nevertheless, they listed the principal ways in which a conversion may take place, which are as follows:

(a) when property is wrongfully taken or received by someone not entitled to do so;

(b) when it is wrongfully parted with;

(c) when it is lost by a bailee in breach of his duty as a bailor;

(d) when it is wrongfully sold, even without delivery, so as to pass good title to the buyer;

(e) when it is wrongfully retained;

(f) when it is wrongfully misused or destroyed; and

(g) when the defendant, without physically interfering with it, wrongfully denies access to it to the claimant.

[61] In the case of *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799; [2014] 2 CLJ 445, the Federal Court in establishing the principles of conversion referred to cases of *Fouldes v Willoughby* (1841) 8 M&W 540; *Sanderson v Marsden and Jones* (1922) 10 Ll L Rep 467 and *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 WLR 1353.

[62] Lord Nicholls of Birkenhead in delivering the judgment of the House of Lords in *Kuwait Airways Corp v Iraqi Airways Corp* held that the basic features of the tort of conversion are as follows:

> 39. Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well-nigh impossible. In general, the basic features of the tort are threefold. *First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods.* The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion.
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> 40. The judicially approved description of the tort in Clerk and Lindsell encapsulates, in different language, these basic ingredients. ... For the purposes of this tort an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer. (Emphasis added.)

[63] Jeffrey Tan FCJ in delivering the Federal Court's judgment in *Zung Zang Wood Products* held that:

> [52] Apart from *Kuwait Airways Corp v Iraqi Airways Co*, a long line of authorities also say that *when a defendant manifests an assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff, he converts the goods to his own use* (see *Fairfax Gerrard Holdings Ltd and others v Capital Bank plc* [2006] All ER (D) 380); *BMW Financial Services (GB) Ltd v Bhagwanani* [2007] EWCA Civ 1230; *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport, The Van Gogh* [2008] EWHC 2794 (Comm), *Thunder Air Ltd v Hilmarsson* [2008] All ER (D) 245; and *White v. Withers LLP and another* [2009] EWCA Civ 1122).
>
> [53] *A conversion is a voluntary act by one person inconsistent with the ownership rights of another.* 'A conversion is the act of wilfully interfering with movable property without lawful justification whereby any person entitled thereto is deprived of the possession of it ... And that the defendant's act may amount to conversion although he has not acted on his own account or converted to his own use ... In order that this article may apply to suits for relief in respect of property acquired by conversion, it is not necessary that the conversion should have been a dishonest one' (The AIR. Manual, 4th Ed, Vol 24 p 821). With respect to shares, appropriation of a share certificate has been held as conversion (*African Strategic Investment (Holdings) Ltd v Main* [2011] EWHC 2223 (Ch)). In the instant case, it was more than mere appropriation of the share certificate. It was a dealing of the property of KCH by the fourth appellant that was wholly inconsistent with the ownership rights of KCH. And those shares were not returned despite the demand by the members of KCH at its 2007 EGM to the fourth appellant to return the same. There could not be a clearer case of conversion. (Emphasis added.)

[64] Accordingly, based on these established principles of the tort of

conversion, the plaintiffs must prove on a balance of probabilities the following elements in order to found a case in conversion of the scaffolding materials against D1:

(a) D1's conduct was inconsistent with the rights of P1 who is the owner of the scaffolding materials and/or P2 who is entitled to the possession of the materials;

(b) D1's conduct was deliberate, not accidental; and

(c) D1's conduct was so extensive an encroachment on the rights of the plaintiffs as to exclude them from the use and possession of the scaffolding materials.

[65] D1 through its directors and employees, D2 to D5 knows that P2 is entitled to the possession of the scaffolding materials after the completion of the Gumusut project. In fact when P2 asked for the status of the scaffolding materials in an email to D3, D4 and D5 in January 2015, D3 replied that they will inform P2 once the scaffolding has reached Labuan. D5 in February 2015 asked P2 whether they could replace the scaffolding materials with locally sourced materials because the scaffolding planks bought in Labuan when returned to West Malaysia would attract surcharge and export taxes because Labuan of Labuan's duty free status. P2 agreed with the proposal provided that scaffolding wooden boards and wooden ladders replaced in West Malaysia are new and the same quality as the one supplied by P2 to D1. When P2 asked D5 the status of the scaffolding materials in March 2015, D5 replied that he placed the order for the planks which will be delivered at the end of that month and that they are arranging to offset the tubes and couples earliest possible. D1 did not inform P2 that the scaffolding materials were already in Labuan in January 2015.

[66] The evidence shows that the delivery of the scaffolding materials to Serba Mahir in Labuan in January 2015 and subsequently to MNLG in Bintulu in August 2015, was without the consent and knowledge of the plaintiff. However, the defendants refused and/or failed to inform P2 of the whereabouts of scaffolding materials. Based on the testimony of the defendants at the sessions court trial, P2 was under the mistaken belief that the scaffolding materials were in Serba Mahir. It was only from Serba Mahir's letter to the police in April 2016 that P2 came to know that D1 had instructed Serba Mahir to deliver the scaffolding materials to MNLG in Bintulu and that the materials were in fact delivered to Bintulu in August 2015.

[67] I agree with plaintiffs' counsel's submission that the defendants concealment of the true location of the scaffolding materials from P2 and untrue testimony during the trial at the sessions court shows that D1's conduct

was a calculated and deliberate act to deprive the plaintiffs of their rights over the said scaffolding materials.

[68] Further, I find that D1's conduct of delivering and/or causing the delivery of the scaffolding materials to Serba Mahir and Bintulu after the expiry of the Gumusut project was so extensive an encroachment on the plaintiffs' rights as it excluded the plaintiffs from the use and possession of the scaffolding materials.

[69] The defendants in paras 13 and 33 of their defence plead that they did not commit any conversion of the scaffolding materials because: (a) they never intended to commit any conversion of the scaffolding materials; and (b) they had acted in good faith and innocently in connection with the scaffolding materials.

[70] The Federal Court in *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505 held that good faith is not a defence to a claim in conversion by the owner of goods. Citing the editors of *Clerk and Lindsell on Tort* and *Winfield and Jolowicz on Tort*, Arifin Zakaria FCJ (as His Lordship then was) concluded that it is settled law that mistake or inadvertence or good faith are no defence to an action in conversion. His Lordship held:

> [23] In *RH Willis & Son v British Car Auctions Ltd* [1978] 1 WLR 438, a case involving the plaintiffs, a car dealer, who also provides hire purchase facilities, and the defendant, a car auctioneer. On the claim by the plaintiffs against the defendant, it was held that the defendant was liable to the plaintiffs in relation to the car sold at the auction by the defendant despite the fact that the defendant was unaware that the car in question was on a hire purchase provided by the plaintiffs. Lord Denning MR in affirming the decision of the court below candidly explained the legal position as follows:
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> > The question that arises is the usual one: which of the two innocent persons is to suffer? Is the loss to fall on the owners? They have been deprived of the £275 due to them on the car. Or on the auctioneers? They sold it believing that Mr Croucher was the true owner. In answering that question in cases such as this, *the common law has always acted on the maxim nemo dat quod non hebat. It has protected the property rights of the true owner. It has enforced them strictly as against anyone who deals with goods inconsistently with the dominion of the true owner.* Even though the true owner may have been very negligent and the defendant may have acted in complete innocence, nevertheless the common law held him liable in conversion.
>
> [24] Therefore, the position is plain, *whether the defendant acted with complete innocence or in good faith would not afford a defence to a claim in conversion by the true owner of the goods or chattel*. The common law has always leaned in favour of the true owner. (Emphasis added.)

[71] The principle that conversion is a strict liability was reiterated by the Court of Appeal in *Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd* [2017] 2 MLJ 592, where Harmindar Singh JCA held:

> [25] *It is axiomatic that acting innocently, in good faith, in ignorance or by mistake is generally irrelevant in a claim for conversion. A defendant's liability in conversion will be established irrespective of whether or not he knew or had reason to know that he was asserting rights belonging to the plaintiff.* In the oft-quoted case of *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956, Diplock LJ expressed the position as follows (at pp 970-971):
>
> > At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known of his neighbour's interest in the goods. This duty is absolute; he acts at his peril.
>
> [26] So unless a defendant can invoke some recognised exceptions, which is not the case here, he will be liable even if his actions were reasonable or well-intentioned. *This strict approach to liability is well established in Malaysian law* as decided by the Federal Court in *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505 and followed in *United Plastics Sdn Bhd v Chan Teng Song & Anor* [2009] MLJU 1556; [2010] 8 CLJ 120 and *Syarikat Bekalan Air Selangor Sdn Bhd v Liew Lai Yin* [2010] 3 MLJ 76.
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> ...
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> [29] *It may be useful to remind ourselves that the law jealously guards the rights of the true owner.* In the Federal Court case of Rimba Muda, Arifin Zakaria FCJ (now CJ) approved of the legal position explained by Lord Denning MR in *RH Willis and Son (a firm) v British Car Auctions Ltd* [1978] 1 WLR 438. (Emphasis added.)

[72] The evidence shows that the defendants did not act innocently or in good faith when they delivered the scaffolding materials to Serba Mahir and instructed Serba Mahir to deliver the materials to Bintulu without the plaintiffs' knowledge or consent. Even if they did act innocently or in good faith, it is settled law that such innocence and/or good faith would not afford the defendants a defence against their liability for conversion.

FINDING

[73] For the reasons above, I find that the plaintiffs have proven on a balance of probabilities that the D1 had committed conversion of the scaffolding materials against the plaintiffs. Accordingly, I find that D1 had committed the tort of conversion in relation to the scaffolding materials which have been delivered to Serba Mahir in Labuan and MNLG in Bintulu.

A LAW ON THE TORT OF CONSPIRACY

[74] There are two types of tort of conspiracy: one is known as 'unlawful means conspiracy' (sometimes also known as 'wrongful means conspiracy') and the other is known as 'lawful means conspiracy' (also known as 'simple conspiracy' or 'conspiracy to injure').

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(a) 'unlawful means conspiracy' is where two or more persons agree to commit an unlawful act which causes the plaintiff to suffer damage. The plaintiff does not have to prove that the defendants had a predominant intention to injure it; and

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(b) whereas in a 'lawful means conspiracy', there need not be an unlawful act committed by the conspirators. However, the plaintiff must prove that the defendants had a predominant intention to injure it and that it suffered damage as a result of the conspiracy.

D

[75] The Court of Appeal in *Global Ventures Network Sdn Bhd v Lokman bin Dato' Mohd Kamal and another* [2018] 6 MLJ 103 in explaining both types of tort of conspiracy referred to Andrew Phang J's oft-quoted definition of the tort of conspiracy in *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others* [2006] 4 SLR 451 at p 491, where he said:

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> [75] It is apposite to note that the actual principles of law relating to the tort of conspiracy are none too clear. What is clear is that there are, traditionally, two separate and distinct aspects or ways of applying the tort of conspiracy. As might have been surmised, the legal principles with respect to each aspect are somewhat different.
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> [76] There is, *first*, the situation where unlawful means have been used (also known as 'wrongful means conspiracy'). The relevant law in this context appears to be straightforward. In particular, *there is no need for the plaintiff concerned to prove that there has been a predominant intention on the part of the defendants to injure it*. It would appear that the very utilisation of unlawful means is, by its very nature, sufficient to render the defendants liable, regardless of their predominant intention. This would appear to be both logical as well as just and fair, especially if we bear in mind the fact *that the central core, as it were, of the tort of conspiracy hinges on the proof that the conspiracy is somehow unlawful and that the plaintiff is entitled to succeed provided that it can prove that it has suffered damage*.
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> [77] *Secondly*, there is the situation where lawful means have been used (also known as 'simple conspiracy' or 'conspiracy to injure'). Unlike the first category referred to briefly in the preceding paragraph, *this second category requires that the plaintiff prove that there has been a predominant intention on the part of the defendants to injure it* (see the leading House of Lords decision of *Lornho plc v Fayed* [1992] 1 AC 448 ('Lornho')). This additional element is required simply because, without it, the alleged conspiracy would be devoid of any element of unlawfulness. *It is precisely because there is a predominant intention on the part of the defendants to injure the plaintiff that the plaintiff is entitled to succeed provided (again) that it (the plaintiff)*
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> I

can prove that it has suffered damage. It is this concerted predominant intention to injure that renders the conduct of the defendants, which would otherwise have been lawful, unlawful or illegitimate. As Lord Bridge of Harwich, who delivered the substantive judgment of the House in Lornho (with which the other law lords agreed), observed (at):

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when the conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful. (Emphasis added.)

[76] The plaintiffs claim against the defendants is for the tort of conspiracy to injure ie the second category of the tort of conspiracy.

[77] The Court of Appeal in the cases of *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 and *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810 held that the essential elements to sustain action of conspiracy to injure are:

(a) a combination or agreement between two or more individuals;

(b) an intent to injure;

(c) pursuant to which combination or agreement and with that intention certain acts were carried out; and

(d) resulting in loss and damage to the plaintiffs.

[78] Therefore, the plaintiffs have to prove that there was an agreement between the defendants with a predominant intent to injure the plaintiffs and that they suffered loss and damage as a result of the conspiracy. The plaintiffs do not have to show that there was an unlawful act committed by the defendants.

(i) Was there an agreement between the defendants?

[79] In *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun and other appeals* [1995] 2 MLJ 493, the Court of Appeal held that conspiracy is a tort that is not always capable of proof by direct evidence as the same can be inferred from the conduct of the defendants. Gopal Sri Ram JCA (as His Lordship then was) in delivering the judgment of the Court of Appeal held at p 515 that:

> *Conspiracy is a tort that is not always capable of proof by direct evidence. Like so many other facts, an agreement to do an unlawful act or a lawful act by unlawful means may*

A *be established by evidence of circumstances from which such an agreement may be inferred*: *Barindra Kumar Ghose & Ors v The Emperor* (1909) 14 CWN 1114. It is axiomatic that there must be proof and not mere conjecture. In the present case there was sufficient evidence from which a conspiracy could be properly inferred. (Emphasis added.)

B

[80] In *Tekital Sdn Bhd v Sarina bt Kamaludin & Ors* [2012] 8 MLJ 734, Nallini Pathmanathan JC (as Her Ladyship then was) quoted the following passage from *Clerk & Lindsell on Torts* (18th Ed) in relation to the element of agreement:

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> A company, being a separate legal person can conspire with its directors; and the knowledge of the company may be found in the person (usually a director) who has management control (as its alter ego) for the transaction or act in question ...

D **[81]** D2, who is D1's managing director, testified when asked during cross-examination that he had a discussion with D1's management team and made the decision to send the scaffolding materials to Serba Mahir. D2 also confirmed that the decision to replace the scaffolding materials was also based on a discussion with his management team. D2 testified that his management E team comprised of Zaimah ('D3'), and Rajan ('D5'), and depending on the subject, Zairul ('D4'), who was D1's finance manager.

[82] D2 also testified that there was a decision made through a meeting to send the scaffolding materials to Bintulu.

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[83] D4 confirmed that there were meetings between the defendants during the sessions court trial in relation to the scaffolding materials. The evidence shows that during the trial at the sessions court, D2, D3, D4 and D5 all testified that the scaffolding materials were at Serba Mahir even though the G materials at that time had been delivered to MNLG in Bintulu.

[84] Nallini Pathmanathan JC (as Her Ladyship then was) in *Tekital* held that proof of the agreement or combination between the first, second and third H defendants to transfer the business and assets of API to the other defendants could be inferred from the net result of their concerted activities over the relevant period. Her Ladyship held:

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> [106] In other words the circumstantial evidence, as I have outlined it in full above, is overwhelming. It is sufficient to enable this court to infer that these defendants acted together and in concert in the transfer of the subject assets of API to the other entities which they too controlled. For these defendants to act together and in concert it is necessary that their concerted unlawful actions were taken pursuant to an agreement made between them. It would be futile to search for an express admission of the subsistence of any such 'agreement'. Indeed co-conspirators are

hardly likely to leave behind a documentary trail to enable the detection of such agreement. If indeed such express evidence was required then it would not be possible to prove the occurrence of such a tort. *The reality is that the court must look to the evidence of their overt acts and the net result of their concomitant actions over the requisite period of time to ascertain whether such an agreement existed or did not.* (Emphasis added.)

[85] In this present case, the emails between the D1 and Serba Mahir and net result of the scaffolding materials were transferred to Serba Mahir in Labuan and MNLG in Bintulu does point to this court to a concerted action between the defendants to encroach the rights the plaintiffs to the materials. However, unlike the defendants in *Tekital*, the D2 had admitted that he and the other defendants who are members of D1's management team had discussions and meetings to discuss and agree to send the scaffolding materials to Labuan and Bintulu without informing P2. Therefore, there is direct evidence before this court of meetings between the D2, D3, D4 and D5 to transfer the scaffolding materials. Also, there is direct testimony from D4 that they had a meeting for the sessions court trial and gave the same untrue testimony during the trial in order to conceal the true location of the scaffolding materials.

(ii) Was there intent to injure?

[86] I find that the defendants' conduct after P2 had filed the suit against D1 in March 2015, shows that the defendants did have the predominant intent of injuring P2 as a way of 'getting back' at P2 for filing the suit against D1 at the sessions court. The conduct are D1 reneging on the agreement agreed between SP1 and D5 for D1 to replace the scaffolding materials purchased in Labuan with new materials purchased in West Malaysia; ignoring P2's queries on the status of the scaffolding materials and its demand for the return of the scaffoldings; and delivering the scaffolding materials to MNLG in Bintulu instead of returning them to P2 and hiding the fact from P2. The defendants also deliberately conspired to give untrue testimonies during the sessions court trial to conceal the delivery of the scaffolding materials to Bintulu from P2 and the sessions court

(iii) Did the plaintiffs suffer any loss or damage?

[87] By reason of the defendants' actions, P2 suffered loss and damage in terms of the rental that P2 owes P1 under the rental agreements. P2 has to continue to pay monthly rental to P1 for the rental of the materials until the scaffolding materials are returned or replaced by D1. P1 as the owner of the scaffolding materials is denied possession and economic use of the materials. In order to undertake any new projects where scaffoldings are required, P1 would have to expend monies to purchase new scaffolding materials in order to be able to carry out those projects.

[88] However, in my view, any damages suffered by P1 by reason of the defendants' conspiracy, is offset by the rental due and payable by P2 for the scaffolding materials under the rental agreements. Therefore, I find that the defendants are liable for the tort of conspiracy to injure against P2 only.

IS THE PLAINTIFFS' CLAIM AGAINST THE DEFENDANT BARRED BY RES JUDICATA?

[89] The defendants plead in their defence that the plaintiffs action against the defendants is barred by res judicata and/or issue estoppel because P2's committal application against D2 to D5 was dismissed by the sessions court on 27 October 2016. The defendants submit that the P2 should have claimed and raised in its session court action against D1 a claim for tort of conversion.

[90] Pursuant to s 25(2) of the Courts of Judicature Act 1964 ('the CJA') this court has the discretion to strike out a suit where the matter in question is res judicata. Item 11 of the Schedule to the CJA provides as follows:

> Res Judicata
>
> 11. Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not be continued.

[91] The wider ambit and application of res judicata was explained in case of *Henderson v Henderson* [1843] 3 Hare 100 by Wigram VC as follows:

> The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the same subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[92] The practical application of Wigram VC's oft-quoted passage in *Henderson v Henderson* was explained by Peh Swee Chin FCJ in the Federal Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 AMR 2559; [1995] 3 CLJ 783; [1995] 1 MLRA 611 as follows:

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata ie doctrine of estoppel per rem judicatum.
>
> We are of the opinion that the aforesaid contrary view is to be preferred; it represents

for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the Courts being found always one step behind the resulting increase in litigation.

[93] P2's claim against D1 in the sessions court was for breach of contract made pursuant to the service agreement. This present suit is premised on the tort of conversion and conspiracy to injure not only against D1 but also D2, D3, D4 and D5. P2 was only made aware that the D1 had sent the scaffolding materials to Serba Mahir in Labuan during the trial at the sessions court. Additionally, P2 only found out that D1 had instructed Serba Mahir to deliver the scaffolding materials to MNLG in Bintulu after the conclusion of the trial at the sessions court. Therefore, P1 and P2 could not have brought an action premised on the tort of conversion against D1 and an action for conspiracy to injure against D2 to D5 prior to the trial at the sessions court. Prior to the commencement of the trial at the sessions court, P2 had been enquiring from D1 monthly of the status of the scaffolding materials but D1 chose to hide the facts of where the scaffolding materials were from P2. Therefore, to paraphrase Wigram VC in *Henderson v Henderson*, even though P2 had exercise reasonable diligence in seeking the status of the scaffolding materials from D1, it could not have known that D1 had delivered the scaffolding materials to Serba Mahir and MNLG, without its knowledge and permission.

[94] As for the committal proceedings commenced by P2 in the sessions court, the sessions court judge dismissed P2's application for committal on the basis that the location of the scaffolding materials was not part of the issues to be tried at the sessions court. P2's appeal to the High Court against the decision of the sessions court to dismiss it committal application was dismissed not on its merits but on a preliminary objection that D2 to D5 were not made parties to the appeal itself.

[95] For these reasons, I find that the plaintiffs present claim against the defendants is not res judicata between the parties. Accordingly, in my view, it would not a correct use of this court's discretion to dismiss the plaintiffs' claim on the basis that res judicata applies to this suit.

EPILOGUE: RETURN OF SOME OF THE SCAFFOLDING MATERIALS

[96] A month after the plaintiffs had filed this suit, D1 returned some of the scaffolding materials to P2 on 20 March 2017. However, it is SP1's testimony

that the materials returned do not correspond with the one supplied by P2 for the Gumusut project. P1 appointed Dura to conduct an inspection of the scaffolding materials returned by D1. Thiru ('SP5') who conducted the inspection on Dura's behalf concluded that there are a large sum of scaffolding materials belonging to unknown third parties among the materials returned to P2. Additionally, the plaintiffs' allege that none of the wooden based materials supplied were returned because they did not received any fumigation report and the bill of lading made no mention of wooden materials shipped; it only showed pipe and fittings.

[97] For this reason, this court ordered that the defendants pay damages in the sum of RM27,167 per month (which is the commercial rate for the rental of scaffoldings) for the scaffolding materials from 25 January 2015–20 March 2017 ie the date that some of the scaffolding materials were returned. For the scaffolding materials not yet returned to the plaintiffs, I have ordered that the amount of damages to be assessed by the deputy registrar of this court.

DECISION

[98] For the reasons above, this court finds that:

(a) the plaintiffs have proven on a balance of probabilities that the scaffolding material in question were purchased by P1 and that P1 is the owner of scaffolding material;

(b) P2 has the right to immediate possession the scaffolding at all material times based on the rental agreement between P1 and P2;

(c) the plaintiffs have proven on a balance of probabilities that the scaffolding materials rented by P2 from P1 were supplied by P2 to D1 for the Gumusut project.

(d) the plaintiffs have proven on a balance of probabilities that D1 had possession of the scaffolding materials from September 2014 to March 2017;

(e) D1 has committed the tort of conversion on the plaintiffs by sending the scaffolding materials to Serba Mahir in Labuan and then to MNLG in Bintulu without the plaintiffs' knowledge and consent;

(f) the defendants have committed the tort of conspiracy to injure P2; and

(g) there is no res judicata or issue estoppel in the plaintiffs' claim against the defendants.

ORDER

[99] The defendants are ordered to pay jointly and severally to the plaintiffs:

(a) the sum of RM27,167 per month for the period beginning from 25 January 2015–20 March 2017; and

(b) interest at the rate of 5%pa on the total sum of the amount in (a) above from the date of judgment until the date of full settlement.

[100] The amount due from the D1 to the plaintiff for the balance of the scaffolding materials not yet returned by D1 to the plaintiff to be assessed by the deputy registrar of this court.

[101] Cost of RM80,000 to be paid by the defendants to the plaintiffs.

Order accordingly.

Reported by Addibah Adnan